No. 97-1211

Supreme Court, U.S.
FILED
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In The

Supreme Court of The United States

October Term, 1997

State Division of Human Rights on the Complaint of:
CHARLES WILLIAMS,

Petitioner,

- against -

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO WRIT OF CERTIORARI

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February 20, 1998

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (5703)

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QUESTIONS PRESENTED

1. Did the United States District Court for the Southern District of New York abuse its discretion by dismissing petitioner's complaint for having repeatedly failed to abide by the court's orders?

2. Did the district court subsequently abuse its discretion by declining to grant petitioner's motions made under Rule 60(b)(1) of the Federal Rules of Civil Procedure to reinstate his complaint, when the petitioner failed to show, or even allege, as required by the Rule, that excusable neglect had occurred?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner: Charles Williams

Respondents: Yellow Freight Systems, Inc.; Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers International Brotherhood of Teamsters

TABLE OF AUTHORITIES

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CHARLES WILLIAMS,

Petitioner,

- against -

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

Brief in Opposition of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The Orders of the District Court are attached respectively at Petitioner's Appendix ("Pet. App.") A-22, A-24 and A-31. The Order of the Court of Appeals for the Second Circuit is at Pet. App. A-28.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did the United States District Court for the Southern District of New York abuse its discretion by dismissing

petitioner's complaint for having repeatedly failed to abide by the court's orders?

2. Did the district court subsequently abuse its discretion by declining to grant petitioner's motions made under Rule 60(b)(1) of the Federal Rules of Civil Procedure to reinstate his complaint, when the petitioner failed to show, or even allege, as required by the Rule, that excusable neglect had occurred?

STATEMENT OF THE CASE

This Court has repeatedly declined to grant petitions for review coming out of the Second Circuit, where the issues presented in the petition are the same as those presented by this case. Moreover, the Court's attention is especially unwarranted by the instant petition which seeks to question the district court's exercise of discretion in failing to grant a motion to reinstate a complaint when the petitioner failed to comply with the explicit language of the Rule under which he made the motion.

The uncontested facts show that the district court did not abuse its discretion in dismissing plaintiff's complaint; before doing so, the district court over extended itself by repeatedly telephoning petitioner's counsel to inquire about his failure to prosecute

the case and comply with the court's orders and in doing so warned him that the complaint would be dismissed if the inaction continued.

It is also uncontested that in making his motions to reinstate the complaint under Rule 60(b)(1) the petitioner failed to allege that excusable neglect had occurred. Indeed, petitioner admits that he did not provide any excuse for his attorney's repeated failure to obey court orders and communicate with the court in his motions to reinstate his complaint. (Pet. at 13.)

These are the facts. On November 9, 1994, the district court dismissed petitioner's action, without prejudice, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute. (Pet. App. at A-31.) Before it dismissed the case, the district court telephoned petitioner's counsel several times to ask why the requested papers were not being submitted as ordered. Finally on October 12, 1994, the court telephoned to warn petitioner's counsel that it would dismiss the complaint if counsel's inaction continued and, the district court again ordered him to submit a scheduling order and discovery plan. (Order, dated July 19, 1996, Pet. App. at A-26.) No scheduling order or discovery plan was ever submitted, and the district court dismissed the complaint.

On July 5, 1995, nearly eight months later, petitioner moved for an order to reinstate the complaint pursuant to Rule 60(b)(1). Petitioner offered no excuse for his former attorney's failure to abide by the district court's orders and prosecute the case. By Order of January 23, 1996, the district court denied the motion to reopen the case.

On February 19, 1996, more than fifteen months after the district court dismissed his complaint, petitioner made a second Rule 60(b)(1) motion to reinstate the complaint. Again, petitioner offered no excuse for his former counsel's neglect. Instead, the petitioner took issue with the district court's conclusion, in its order of dismissal, that former counsel had failed to communicate with the district court.

In support of this argument the petitioner pointed to a letter to respondents' attorneys, dated November 8, 1994, the day before the dismissal, enclosing a proposed scheduling order for their review. However, plaintiff again failed to offer any explanation in support of his motion to excuse his former attorney's inordinate delay in submitting the scheduling order to opposing counsel or excusing his inability to follow through and submit it

to the district court. (Order, dated July 19, 1996, Pet. App. at A-26.)

On October 21, 1997, the Second Circuit affirmed the district court's decisions because the petitioner failed to establish excusable neglect entitling him to reinstatement of his complaint. (Pet. App. at A-28.)

ARGUMENT

A. The United States District Court for the Southern District of New York did not abuse its discretion by dismissing petitioner's complaint for his attorney's repeated failure to abide by the court's orders?

There is no merit to petitioner's contention that the district court abused its discretion by dismissing this matter. This Court has stated that "when the circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so . . . ." Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962). In Link, this Court reasoned that a district court must be able to "manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 630-31.

This Court further noted that if an action is dismissed for failure to

prosecute and the statute of limitations bars a new action, the proper remedy is against the former attorney in a suit for malpractice, rather than vacatur of the dismissal. Id. at 634 n.10. (emphasis added).

The district court in the instant case provided more care than even required by law. After petitioner's counsel disobeyed the court's orders, the court contacted counsel to warn of possible dismissal. No such notice was required.

B. The District Court Properly Denied the Rule 60(b)(1) Motion Because Petitioner did not Demonstrate, nor Even Allege, Excusable Neglect.

In relevant part, Rule 60(b)(1) provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . . .

Fed. R. Civ. P. 60(b)(1).

The Second Circuit has consistently followed this Court's rationale in Link and has repeatedly declined to relieve

clients under Rule 60(b)(1) of the "burdens of a final judgment entered against [them] due to the mistake or omission of [their] attorn[ies] by reason of the latter's ignorance of the law or of rules of the court, or [their] inability to efficiently manage [their] caseload." United States v. Cirami, 535 F.2d 736, 739 (2d Cir. 1976). Petitioner "voluntarily chose [his attorney] as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." Id. at 740 (quoting Link, 370 U.S. at 740); See Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1996); see also Samuels v. Northern Telecom, Inc., 942 F.2d 834, 837 n.2 (2d Cir. 1991).

This Court has consistently denied review of petitions coming out of the Second Circuit which challenge the district court's refusal to grant plaintiffs relief from the result of their attorney's acts or omissions. See Teltronics Serv., Inc. v. L M Ericsson Telecomm., Inc. 642 F.2d 31, 36 (2d Cir.), cert. denied, 450 U.S. 978 (1981); United States v. Erdoss, 440 F.2d 1221, 1223 (2d Cir.), cert. denied, sub nom., Horvath v. United States, 404 U.S. 849 (1971).

In any case, petitioner has failed to establish any facts that materially contradict the court's conclusion that plaintiff's former attorney failed to

prosecute the case and communicate with the district court. Thus, as a matter of law, petitioner has given no basis for the case to be reopened.

C. Failure of Petitioner To Personally Receive Notice of The Dismissal Did Not Violate His Right To Trial.

Petitioner's assertion that he was deprived of his right to trial because he did not receive personal notice of the dismissal is also without merit. Pursuant to Rule 5 of the Federal Rules of Civil Procedure, service of notice of entry of final judgment pursuant to Rule 77(d) is made on the attorney, not the party. See Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 809 n.9 (2d Cir. 1981), cert. denied, 459 U.S. 832 (1982). And, in any case, petitioner did get actual notice of the dismissal in time to make his first motion under Rule 60(b)(1) to reinstate his cause of action.

CONCLUSION

The district court did not abuse its discretion and the Second Circuit did not err in affirming the decision of the district court. There is no issue in the instant petition sufficiently significant to warrant review by this Court. For

these reasons, the petition for certiorari should be denied.

Dated: New York, New York
February 17, 1998

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